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IN THE

Supreme Court of the United States

October Term, 1965

No. 548

G. P. HODGES and R. H. HODGES,
Appellants,

vs.

BUCKEYE CELLULOSE CORPORATION,
An Ohio Corporation,
Appellee.

APPELLANTS' OPPOSING BRIEF AS TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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FREE PRESS PUB. CO., INC. - TAMPA

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Appellants, G. P. HODGES and R. H. HODGES, files this, their Opposing Brief opposing Appellee's Motion to Dismiss or Affirm, in pursuant to Rule 16(3) of this Court, as to the questions presented in Appellee's Motion, to wit:

1. Was the decision of the First District Court of Appeal dismissing appellants' interlocutory appeal a "Final Judgment" within the scope of 28 USC Section 1257?

2. Was the First District Court of Appeal the "Highest Court" of the State of Florida in which review could be had as required by 28 USC Section 1257?

3. Did the decision of the First District Court of Appeal uphold the validity of a state statute over the contention that it was repugnant to the Constitution of the United States, as required by 28 USC Section 1257(2)?

4. Does the appeal present any substantial federal or constitutional question decided adversely to appellants by the state courts?

5. If the appeal is treated as a petition for a writ of certiorari, does the decision below involve any special or important federal question?

ARGUMENT

Appellee's questions 1 and 2 will be argued as one because the two are inseparable.

Appellants submit that the decision of the District Court of Appeal, which is the basis of this appeal, was a Final Judgment.

The Supreme Court of the State of Florida is the court of last resort in the State of Florida, but its jurisdiction as to appeals from district courts of appeals is limited, and set forth in Article V, Section 4(2) of the Constitution of the State of Florida, the applicable portion reads as follows:

> *"Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty,* or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law." (Emphasis supplied)

The powers of the Supreme Court to review decisions of the District Courts of Appeal are limited and prescribed by the Constitution. *Diamond Berk Insurance Agency v. Goldstein,* 100 So. 2d 420 (Fla. 1957); *Sinnamon v. Fowlkes,* 101 So. 2d 375 (Fla. 1958).

Rule 2.1(5)(b) of Florida Appellate Rules, contains practically the identical portion of the Constitution of the State of Florida, as quoted above.

Appellee cites *Dresner v. City of Tallahassee,* 375 U.S. 136 (1963) and 164 So. 2d 208, and on page 7 of its Brief quotes a portion of the case as decided by the Supreme Court of the State of Florida. Appellee apparently cites the case to stand for the proposition that the instant appeal is not final. If anything, the case of *Dresner v. City of Tallahassee,* as decided by the Supreme Court of the State of Florida, would bolster Appellants position that the instant case that was decided by the District Court of Appeal, First District, was, and is final, because it does not come within the purview of any of the requirements of the Supreme Court's Appellate Jurisdiction under the Constitution or Appellate Rules, as can readily be seen by a cursory observation of the above quoted portion of the Constitution and of the quoted portion at page 7 of Appellee's Brief, and a careful reading of the case bears out that since July 1, 1957 the Appellate Jurisdiction of the Supreme Court of the State of Florida has been limited as to the matters and issues that come within the constitutional portion quoted above. The case of *Dresner v. City of Tallahassee* has little similarity to the facts involved in the instant appeal. Besides the fact that that case was decided on its merits in the Municipal Court of Tallahassee, Appellate proceedings subsequent to that time was a comedy of errors in that the Defendant attempted to appeal directly from the Municipal Court to the Supreme Court of the State of Florida, which appeal was transferred to the Circuit Court, Second Judicial Circuit, where it was affirmed, when the

Defendant filed a Petition for Certiorari addressed to the Florida District Court of Appeal, First District, which was not timely filed, and then by that time the Defendant was frustrated to the extent that an attempt was made to by-pass the District Court of Appeal and the Supreme Court of Florida and appeal directly to the Supreme Court of the United States, when it is obvious that the Petition for Certiorari to the District Court of Appeal would have been appropriate had it been timely filed.

Therefore, it can readily be seen that the jurisdiction of the Supreme Court of the State of Florida was cut off by the District Court of Appeal refusing to initially pass upon the validity of Chapter 24952, Laws of Florida 1947. This, of course, has created a most unusual situation, in that the result of the decision of the District Court of Appeal was that they did indirectly what they could not have done directly, which was pointed out in Appellants' Jurisdictional Statement in the paragraph commencing at the bottom of page 8. Nor is there any provision in the above quoted portion of the Constitution of the State of Florida, or Appellate Rules, or any other means, whereby Appellants could have petitioned the Supreme Court of the State of Florida by certiorari to review the said decision of the said District Court of Appeal.

Appellants submit that the decision of the District Court of Appeal is final. It must be kept in mind that the trial court entered an order striking Count I and paragraphs 18 and 19 of Count I incorporated by reference into Count II of Appellants' Amended Complaint (see copy of said order at page A-8 of Appellants' Jurisdic-

tional Statement), which said stricken portions pertained to all of the allegations contesting the validity of said Special Act 24952. When portions of pleadings, especially whole counts, are stricken, such is, Appellants submit, by its very nature final, and when the District Court of Appeal entered its decision affirming the trial court's ruling, it certainly became final at that time, subject to this appeal, because it immediately became the law of the case.

Appellants are aware of no provision whereby the issue could ever be litigated again, the outcome of this appeal excepted, and submit that there is none. Therefore, if it could not be litigated again, it would necessarily follow that it is final.

The Appellee discussed, at considerable length, and suggested that Appellants could have sought review by certiorari under Article V, Section 4, of the Constitution of the State of Florida, and Rule 2.1 a.(5) (a) of Florida Appellate Rules under the theory that the decision could have been certified by a District Court of Appeal to be of great public interest, and in support thereof cited *Gotthilf v. Sills,* 375 U.S. 79 (1963). Appellants submit that the Gotthilf case could have no bearing whatsoever on this case. In the first place, the Gotthilf case arose in the State of New York, under Section 589 of the New York Civil Practice Act, which provided that appeals from final orders could only be taken to the Court of Appeals by leave of the Appellate Division upon certified questions. The Supreme Court of the State of Florida and District Courts of Appeal of the State of Florida, where applicable, have repeatedly held that certified questions from a lower court will only be entertained in

cases where it does not appear that the question is without controlling precedent, and that the lower court does not have power to adjudicate the questions, and when the issue can be decided on no other theory (see *Dade County v. Philbrick,* 162 So. 2d 266 (1964); *Jaworski v. The City of Opa-Locka,* 149 So. 2d 33 transferred to 149 So. 2d 566). It is obvious that there was no issue of not being any controlling precedent, because certainly the District Court of Appeal could have ruled the said Special Act 24952 either constitutional or unconstitutional, but it refused to do so. Moreover, since the District Court of Appeal refused to rule as to whether the said Special Act was constitutional or unconstitutional, it would seem to be a foregone conclusion that it would not certify the issue to the Supreme Court of the State of Florida as a question of great public interest.

Since Appellee has raised the question, in these late appellate proceedings, that the Appellants could have petitioned for a writ of certiorari as to the decision of the District Court of Appeal because it was of *great public interest,* Appellants submit and invite this Court's attention to the fact that the issues covered by the stricken portions of Appellants' Amended Complaint was, and is, of great public interest, in that it pertained to pollution of not only the Fenholloway River, but underground percolating water. The Congress of the United States, the President of the United States and the news media of this country have recognized and sounded warnings as to the acute seriousness of the water pollution problem facing this country today; that water pollution is a luxury that this country cannot afford and that time is running out. Appellants, therefore, suggest

that this Court take judicial notice of this critical problem, and consider it to be one of great public interest.

In question 3 of Appellee's Motion to Dismiss or Affirm, it was argued that said Special Act, Chapter 24952, was not repugnant to the Constitution of the United States, unless the District Court of Appeal would have determined it to not be so. In this respect, Appellants submit that this goes to the very heart of this issue, and Appellants feel that there is one question that could, and does, encompass all of the issues involved in this appeal, which said question Appellants submit and invite the Court's attention, to wit:

> MAY A STATE COURT PRECLUDE REVIEW BY THE SUPREME COURT OF THE UNITED STATES OF THE CONSTITUTIONALITY OF A STATE STATUTE BY REFUSING TO PASS ON THE CONSTITUTIONALITY OF SUCH STATUTE EVEN THOUGH APPELLANTS ARE OBVIOUSLY INJURED BY SUCH PATENTLY UNCONSTITUTIONAL ACT?

Because if a state court can avoid review of a federal constitutional question merely by stating that there is none, then there would be an intolerable paradox — that an erroneous decision of the State Court would be superior to the Federal Constitution, which is supposed to protect all the citizens of the country.

Appellee's 4th question argues that the questions raised by Appellants were no Special or Important Reasons to the extent that such would warrant the granting of a Writ of Certiorari, and it even suggested that the

validity of Chapter 24952 is merely academic as far as Appellants are concerned. Appellants submit that there is nothing academic when one has his property (which has been the family Homestead for almost a half century) wrested from him by another with the help of special interest legislation. If special interest legislation can be enacted, enabling one to wrest property from another contrary to the language of the Supreme Court of the United States in the case of *Regan v. Farmers Loan, etc. Co.,* (Texas 1894), 14 S. Ct. 1047, 154 U.S. 390, 38 L. Ed. 1014, in the first column at page 1024 of 38 L. Ed. wherein the Court stated:

> "In every constitution is the guarantee against the taking of private property for public purposes without just compensation. *The equal protection of the laws which, by the 14th Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is without compensation wrested from him for the benefit of another or of the public."* (Emphasis supplied);

then it would appear that the constitutional guarantee would have little meaning, and Appellants submit hat this is especially true and noteworthy where the general statutory laws of the State of Florida prohibits and makes it a crime to do the things the said Special Act permits. In fact, Appellants submit that instead of the validity of Chapter 24952 being merely academic, it is about as flagrant a piece of special interest legislation as one could envision.

In opposition to Appellee's question 5, wherein it was argued that the questions raised by Appellants were too unsubstantial to warrant further argument. Appel-

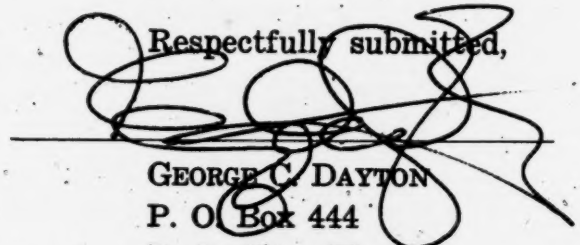
lants alleged in the portions of their Amended Complaint that was stricken that their real property, which had been the family Homestead since the year 1926 had been reduced to a practically worthless state by acts of the Appellee operating with immunity and impunity from risks of penalty from statutory general laws of the State of Florida. The Constitutional guarantees pertaining to due process of law and the equal protection of the laws are the very basic fundamental things which undergird the constitutional principles under which we live. This is not just an ordinary case of someone doing a thing under special legislation, but this is an instance where Appellee is doing acts under special legislation which is contrary to and diametrically opposed to the general statutory laws of the State of Florida, which said general statutory laws, Appellants submit that they have a vested right to claim all the benefits under as all of the other citizens of the other 66 counties of the State of Florida. When allegations are made, as Appellants did in the portions of their Amended Complaint which were stricken, that their constitutional rights had been invaded, then they submit that such questions are never unsubstantial.

CONCLUSION

This Court has not in the past, and especially in recent years, failed to take jurisdiction of matters wherein ones civil rights were infringed upon by state legislation. Appellants submit that ones right to own and hold property, without the same being wrested from them under special legislation, is just as basic under the Constitution of the United States and the Constitution of the State of Florida, as ones civil rights, and, therefore, request that this Court take jurisdiction of this appeal and of the subject matter involved, either by Appeal or by Certiorari, and that it enter such orders as may be necessary, including that of ordering the District Court of Appeal, First District, State of Florida, to rule directly as to whether Chapter 24952, Laws of Florida, 1947, is constitutional or unconstitutional.

DATED at Dade City, Florida, October 18th, 1965.

Respectfully submitted,



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